

"We Were All Born on It. And Some of Us Was Killed on It":

Adopting a Transformative Model in Eminent Domain Mediation

"For the individual property owner, the appropriation is not simply the seizure of a house. It is the taking of a home—the place where ancestors toiled, where families were raised, where memories were made." ²

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I. INTRODUCTION

Eminent domain is "the inherent power of a governmental entity to take privately owned property . . . and convert it to public use."³ Eminent domain takings are restricted in the United States to those instances in which the owner of the private property is justly compensated by the government.⁴ The

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¹ THE GRAPES OF WRATH (20th Century Fox 1940). Farmer turned itinerant preacher Muley Graves is expressing his frustration at being removed from his land after a bank foreclosure. *Id.* Muley's entire speech from the film is:

My grandpa took up this land 70 years ago, my pa was born here, we were all born on it. And some of us was killed on it . . . and some of us died on it. That's what make it our'n, bein' born on it . . . and workin' on it . . . and . . . dyin' on it! And not no piece of paper with writin' on it!.

Id.

² *City of Norwood v. Horney*, 853 N.E.2d 1115, ¶ 4 (Ohio 2006).

³ BLACK'S LAW DICTIONARY 233 (2d Pocket Ed. 2001).

⁴ U.S. CONST. amend. V. The Fifth Amendment has been incorporated into the Fourteenth, and has thereby been applicable to the states, for more than a century. *See Chicago, B.&Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). At issue in the case was the amount of compensation to be paid, by the city of Chicago to the railroad, for the condemnation of part of a right of way due to the extension of a street over railroad property. *Id.* at 230. The jury valued the loss of the right of way at one dollar. *Id.* The Court ruled that the city need not compensate the railroad for the expense of making the new crossing created by the roadway safe and secure. *Id.* at 255.

government need not retain possession of any property taken under the eminent domain power, but rather it may pass the property to another private party so long as the ultimate use of the property is for a public use.⁵

This Note argues pointedly for further incorporating mediation—transformative mediation in particular—as a mechanism for resolving property valuations in eminent domain disputes. Furthermore, the Note argues that where process values are of paramount importance, as they are in eminent domain disputes, a transformative mediation model is strongly indicated. Part II of this Note briefly discusses the historical development of eminent domain doctrine in the United States. Part III addresses the applicability of mediation in general—while Part IV addresses transformative mediation specifically—to eminent domain disputes. Part V discusses existing program frameworks and models from which to borrow—including the United States Postal Service dispute resolution model and the mediation programs of the Federal Mediation and Conciliation Service. Part VI sets forth recommendations for eminent domain mediation program design. Finally, Part VII offers some concluding remarks and recommendations for successful implementation of the model.

II. HISTORICAL DEVELOPMENT OF EMINENT DOMAIN DOCTRINE

There are very few rights that are held more closely than property rights.⁶ Property "embraces every thing to which a man may attach a value and have a right."⁷ John Locke felt that the definition of property included "the products of human creativity" in addition to "land and material possessions," declaring that "the great and chief end of government" is the maintenance of

⁵ *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2661 (2005). A detailed discussion of *Kelo* is included, *infra*.

⁶ See ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* 25–26 (1999). Property has been defined as "the set of government-backed rights one has in the physical thing." *Id.* at 27. Of the four core property rights—"possession, use, exclusion of others, and disposal"—the Supreme Court has indicated the right to exclude is entitled to elevated status. *Id.* (citations omitted). James Madison offered quite a broad conception of property, and seemed to anticipate the Court's elevation of the right to exclude others. James Madison, *Property* (orig. pub. 1792), available at The Founder's Constitution, <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html> (last visited Jan. 27, 2008). Both Madison and Locke conceived of property rights as extending well beyond those found in real property. MELTZ ET AL., *supra*, at 25–26.

⁷ Madison, *supra* note 6.

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

property rights.⁸ The focus of this Note is squarely on eminent domain actions that affect interests in land, and does not take into account other property issues, such as those arising from rights in personal and intellectual property.⁹ Furthermore, it is important not to overstate the case for inviolability of rights: Property rights are not set in stone, and they have a history of evolving along with society's changing character.¹⁰ With that being said, it remains clear that malleable as they may be, property rights are rights held dear to individual owners.¹¹ In order to fully understand how current eminent domain actions impact landowners, it is instructive to get a handle on just how seriously property interests were taken in the early years of the United States.¹²

During the colonial era there were not many restrictions on takings of land, even to the extent that private landowners could often appropriate others' private land without owner consent.¹³ This policy helped to satisfy the economic growth needs of early American society.¹⁴ It was not until after the Revolution began that the states in any number started to add language to

⁸ MELTZ ET AL., *supra* note 6, at 25 (quoting JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 71 (1952) (orig. pub. 1690)).

⁹ However, this Note does not offer the point of view that a transformative mediation model is inappropriate for resolving property disputes that do not arise from interests in land. Such a model might very well be successful, but that discussion is beyond the scope of the present argument.

¹⁰ See MELTZ ET AL., *supra* note 6, at 26.

¹¹ Of course this is not surprising given that the impetus for settlers to arrive on the shores of North America was a desire for land. See WALTER A. MCDougALL, *FREEDOM JUST AROUND THE CORNER: A NEW AMERICAN HISTORY 1585–1828* (2004).

¹² Pressures to find and protect land led to early colonists to take up arms in rebellion against the Virginia colonial government in 1676. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT* 40 (Perennial Classics 2001) (1980). While Bacon's Rebellion began after pressures for land led to the anti-aristocratic and anti-Indian uprising, hopes for the redistribution of wealth—"leveling"—seem to have contributed to its wide popularity among the Virginia people. *Id.* at 40–42.

¹³ Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 500 (2006).

¹⁴ *Id.* at 503. This economic development didn't occur without associated costs. The power of eminent domain was often exercised in favor of commercial interests over farmer's land. ZINN, *supra* note 12, at 239. Concurrently, damage awards were "taken out of the hands of juries, which were unpredictable, and given to judges." *Id.* More recently in the mid-Twentieth century, at least 1,530 apartments were demolished to build a one-mile stretch of the Cross-Bronx Expressway in New York City, leading to the displacement of at least 5,000 people. ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 850 (Vintage Books 1975).

their constitutions limiting eminent domain actions to public uses.¹⁵ A traditional use of eminent domain was to create instruments for the public use such as roads and parks.¹⁶

Whether relying on theories of natural law or of constitutional interpretation, early post-Revolution eminent domain decisions held that takings for private uses were not legal.¹⁷ The spirit of the new property protections was memorialized by James Madison: "that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*" (emphasis in original).¹⁸

Regardless of the country's early restrictions on eminent domain to public uses, by the end of the nineteenth century private interests were being granted eminent domain power, especially in the western states.¹⁹ The beginning of the twentieth century saw further eminent domain law development. The Supreme Court held there was not an unwaivable requirement that a large proportion of the community benefit from a use for it to be deemed public.²⁰ Eminent domain doctrine proceeded to gain strength as federal law made federal funds available for slum clearance and public housing construction in the 1930s and 1940s.²¹

The turn toward affirming private involvement in eminent domain actions was made with conviction after the Supreme Court decision in *Berman v. Parker*.²² Writing for the majority, Justice Douglas determined

¹⁵ Cohen, *supra* note 13, at 504.

¹⁶ Mary Kay Schuft, *Walser Auto Sales, Inc. v. City of Richfield*, 644 N.W.2d 425 (Minn. 2002): *Why the Minnesota Decision That Seemed So Wrong Was Right*, 26 HAMLINE L. REV. 463, 472–73 (2003). A famous example of the use of eminent domain to create public spaces is the acquisition in the 1850s and 1860s of 843 acres of central Manhattan to complete the footprint of Central Park. EDWIN G. BURROUGHS & MIKE WALLACE, *GOTHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 792 (1999).

¹⁷ Cohen, *supra* note 13, at 505–06.

¹⁸ Madison, *supra* note 6.

¹⁹ Cohen, *supra* note 13, at 508.

²⁰ *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923).

²¹ Cohen, *supra* note 13, at 510. Clearing slums necessarily displaced the people who called the slums home. CARO, *supra* note 14, at 1151. One New York City plan called for a rolling program, whereby public housing was initially built on public land so tenants from a set of cleared slums could relocate. *Id.* After the initial relocation, the newly cleared slum land would be repurposed as public housing for residents of the next slum that was to be cleared. *Id.* The isolation of the public housing in such plans tended to create new ghettos, reaffirming the problem the plan was originally created to eliminate. *See id.*

²² *See* Cohen, *supra* note 13, at 510–11.

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

that eminent domain was "the means to the end" of governmental use of police power.²³ In a subsequent case, the Court highlighted its position that deference to the legislature was in order when determining whether the public use put forth by the government was a valid one.²⁴ This stance of deference to the legislature, combined with the view of eminent domain as a way to enforce valid police powers, set the stage for the most recent, and arguably most controversial, eminent domain case in Supreme Court jurisprudence.

In that most recent case, the United States Supreme Court held that economic development is an appropriate public use to justify the exercise of eminent domain power.²⁵ *Kelo v. City of New London, Connecticut* made headlines when it was decided and was discussed on the national stage.²⁶ The case arose out of a redevelopment plan in the City of New London that featured private development.²⁷ Fifteen homeowners refused the city's offer of compensation for their property and went to court to challenge the taking of their property for the redevelopment.²⁸ The taking of the properties was upheld by the Court, which found that the purpose of the redevelopment trumped its mechanics in the public use analysis,²⁹ and that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose."³⁰

Two recent developments have helped to define the early legacy of *Kelo*. In the summer of 2006, Ohio was the first state to have its supreme court rule on the issue of economic redevelopment takings.³¹ The Supreme Court of

²³ *Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

²⁴ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

²⁵ *Kelo*, 125 S. Ct. at 2665.

²⁶ See Linda Greenhouse, *Justices Uphold Taking Property for Development*, N.Y. TIMES, June 24, 2005, at A1. The case was decided on a five to four vote. *Id.*

²⁷ *Id.* at A20. The development concerned a pharmaceutical research center, hotel and conference facilities, and a pedestrian pathway. *Id.* Justices O'Connor and Thomas, in dissent, worried that the burden of a new regime allowing for private development takings would fall unfairly on the poor. *Id.*

²⁸ Greenhouse, *supra* note 26, at A1. Particularly poignant was the story of one of the homeowners who was born in her house, and had lived for the ensuing eighty-seven years. *Id.* The Court acknowledged the danger of hardship that such a taking would entail. *Kelo*, 125 S. Ct. at 2668. However, the Court retained its focus on the future, not the past use, of the properties in question. *Id.* at 2666 n.16.

²⁹ *Kelo*, 125 S. Ct. at 2664.

³⁰ *Id.* at 2665–66.

³¹ Ian Urbina, *Ohio Supreme Court Rejects Taking of Homes for Project*, N.Y. TIMES, July 27, 2006, at A18.

Ohio declined to extend state law to the extent allowed by *Kelo*, and denied the City of Norwood's attempt to exercise its eminent domain powers for an economic redevelopment project.³² More broadly, during the 2006 fall elections, laws were enacted in nine states to restrict the uses of the eminent domain power, bringing to thirty-four the total number of states that restrict the exercise of eminent domain power for economic development purposes.³³ The future of eminent domain takings for redevelopment purposes is unclear, despite the permission granted by the *Kelo* decision. It is clear, however, that the current state of eminent domain law is one in which private homeowners in many states have cause to see economic redevelopment projects as threats to their property.

The *Kelo* decision forms a cornerstone of one facet of an eminent domain regime—economic development takings—that one commentator has characterized as being "tainted by the abuse of existing property owners, . . . capture[d] by special interests, and inefficiency."³⁴ Presumably, when the taking of private property by the government is at hand, even if it not as in as dramatic a fashion as what was found in *Kelo*, powerful emotions will be stirred up.³⁵ The question remains: Is there a way to resolve these disputes in a way that will tend to foster greater understanding and minimize damage to a property owner's relationship to the government?

III. WHY MEDIATE EMINENT DOMAIN DISPUTES?

Alternative dispute resolution within the context of eminent domain disputes is not a new development; what might be currently recognized as an early form of arbitration in these cases dates back to at least the 1660s and the rebuilding efforts after the Great Fire of London.³⁶ More modernly, at

³² *Horney*, 853 N.E.2d at ¶ 75.

³³ Terry Pristin, *Voters Back Limits on Eminent Domain*, N.Y. TIMES, Nov. 15, 2006, at C6.

³⁴ Cohen, *supra* note 13, at 497. Cohen is admittedly criticizing economic development takings in particular, but his criticism of that particular facet of eminent domain law is at the least illustrative. *See id.*

³⁵ *See Horney*, 853 N.E.2d at ¶ 4.

³⁶ LISA JARDINE, *THE CURIOUS LIFE OF ROBERT HOOKE: THE MAN WHO MEASURED LONDON* 157–59 (2004). Robert Hooke was responsible for surveying the city during the post-fire rebuilding efforts. *Id.* at 157–58. In addition to his surveying duties, Hooke's role was to collect and provide evidence to the Fire Courts, the adjudicative body for disputes arising out of the rebuilding efforts. *Id.* at 158. Furthermore, Hooke was put into contact with disputants while attending meetings of the City Lands Committee—set up to settle compensation claims arising from governmental takings. *Id.* There is evidence that

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

least five states either mandate or provide for the use of mediation in eminent domain disputes. In Florida, the government must attempt to bargain in good faith with landowners in all eminent domain cases before a suit will be heard in court,³⁷ but these pre-suit negotiations may become mediations if the parties so desire.³⁸ Utah has established an Office of Property Rights Ombudsman to conduct mediation in these disputes at the request of the parties.³⁹ Indiana allows for mediation if the property owner requests it.⁴⁰ California allows for mediation of property valuation disputes in the eminent domain context.⁴¹ Finally, Connecticut provides for mediation in condemnation disputes upon party request.⁴² In Connecticut, the parties have control over the selection of the mediator, but the courts are empowered to appoint one if the parties cannot reach an agreement as to whom to select.⁴³ Looking at the states with statutes on point, it seems that mediation has at the very least gained a foothold as an officially sanctioned mechanism for resolving eminent domain disputes.

While falling short of explicitly endorsing mediation as a resolution mechanism in eminent domain disputes, the *Kelo* decision does acknowledge the power of private developers to use private means to resolve disputes that might otherwise end up as economic takings litigation.⁴⁴ This Note recognizes the possibility that mediation might occur in all stages of the eminent domain dispute process, not just after a landowner has filed suit or a developer has appealed to local government to institute the eminent domain action. However, because of the myriad of ways in which disputes can be resolved prior to the filing of a lawsuit, both formal and informal, this Note will be limited to those disputes which are a product of the litigation system, and the recommendations contained herein are all predicated on that assumption.⁴⁵

Hooke actually facilitated or brokered negotiated settlements between parties in these sorts of disputes. *Id.* at 159.

³⁷ FLA. STAT. ANN. § 73.015(1) (West 2006).

³⁸ FLA. STAT. ANN. § 73.015(3) (West 2006).

³⁹ UTAH CODE ANN. § 13-43-204 (West 2006).

⁴⁰ IND. CODE § 32-24-4.5-7 (2006).

⁴¹ CAL. CIV. PROC. CODE § 1250.420 (West 2006).

⁴² CONN. GEN. STAT. § 12-242kk (2006).

⁴³ *Id.*

⁴⁴ *Kelo*, 125 S.Ct. at 2668 n.24.

⁴⁵ Different states that have adopted mediation as an eminent domain dispute resolution mechanism are illustrative on this point. Connecticut law provides that the court will immediately refer an eminent domain appeal to mediation. CONN. GEN. STAT. § 12-242kk (West 2006). California, on the other hand, has a permissive statute that

Apart from the practical attraction of mediation in eminent domain disputes—grounded in the reality that mediation is being used already in a number of jurisdictions to handle these cases—there are theoretical implications of choosing mediation as the dispute resolution process of choice.⁴⁶ Professors Sander and Rozdeiczer offer two possible definitions of what the most appropriate process might be for a given dispute profile: (1) that which "best satisfies the interests of both parties," and (2) that which "best satisfies the goals of a court, society, or the state."⁴⁷ The most appropriate process is also one that will, obviously, lead to the resolution of the types of disputes that will be involved.⁴⁸

Even though there are problematic power imbalances inherent in any eminent domain dispute,⁴⁹ mediation may be tailored to overcome them.⁵⁰

allows the parties to elect mediation rather than a judicial determination. CAL. CIV. PROC. CODE § 1250.420 (West 2006). However, these statutes share an assumption that an adjudicative process is, at some point, involved in the dispute.

⁴⁶ Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 2 (2006). The authors admit that such process design choices are more art than science, but they are willing to attempt to rationalize these choices despite the caveat. *Id.* See generally Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545 (2002) (discussing the development of court-connected mediation programs after the Pound Conference and predicting the further development of mediation theory as court-connected programs continue to grow and develop).

⁴⁷ Sander & Rozdeiczer, *supra* note 46, at 2. Sander and Rozdeiczer offer some reservations about using mediation where important public policies are at stake, especially in cases where significant imbalances of power exist. *Id.* at 38–39. However, their argument seems to anticipate that proper mediation program design could alleviate some, if not all, of the concerns related to mediating public policy issues. See *id.* at 39–40.

⁴⁸ *Id.* at 2. Furthermore, one commentator has theorized that it is the judiciary's responsibility to protect individual property rights. BERNARD H. SIEGAN, *PROPERTY AND FREEDOM* 239–40 (1997). Mediation's emphasis on party self-determination might very well be uniquely suited to allow parties to assert their own liberty interests in pursuit of exercising their property rights. See UNIFORM MEDIATION ACT, PREFATORY NOTE, Part 2 (2003), available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.pdf> (last visited Jan. 27, 2008).

⁴⁹ There are two related causes of action under the Takings Clause: condemnation and takings. MELTZ ET AL., *supra* note 6, at 3. Condemnation occurs "when there is no doubt that a taking is involved . . . [T]he only seriously contested issue is how much the government must pay for the property." *Id.* Takings, on the other hand, are implicated when government impinges upon an interest in property without notifying the landowner. *Id.* The burden to show that there was a taking is on the property owner. *Id.* at 3–4. Arguably, the power imbalance is greater in a takings action because of the initial burden

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

As long as the power differentials in these disputes are recognized, and the jurisdiction designing and implementing the mediation programs is committed to addressing them, the importance of the relative power of the parties may be diminished.⁵¹ Where power differentials are not only commonplace, but are present in every dispute that a particular mediation program is confronted with, then proper program design can serve to mitigate, if not eliminate, the effects of those power differentials.⁵² Even with these concerns in mind, mediation is a strong choice for any dispute resolution system designed to handle disputes with inherent power imbalances, such as those found in eminent domain actions.⁵³

IV. ADOPTING TRANSFORMATIVE MEDIATION IN EMINENT DOMAIN DISPUTES

A. Mediation Models: A General Introduction

Generally, mediation is a process in which a neutral third party assists parties in conflict in reaching a settlement to their dispute.⁵⁴ The role of the

to prove a property encroachment. However, power imbalances are very much present regardless of how the cause of action is classified. *See Kelo*, 125 S. Ct. at 2686–87 (Thomas, J., dissenting) (reviewing the history of urban renewal condemnation actions as falling in neighborhoods where "the least politically powerful" live).

⁵⁰ Sander & Rozdeiczer, *supra* note 46, at 30. It is not universally accepted that mediation is able to overcome such power differentials, or if it is able, whether it should. *Id.* However, the transformative model, discussed at length, *infra*, contemplates such power imbalances and is designed to foster a dynamic that assists parties in achieving empowerment.

⁵¹ *See id.* at 30–31 ("Knowing her sources of power, the weaker party should strategically select a forum where her powers are relatively strongest.").

⁵² *See id.* at 39. Sander and Rozdeiczer make a point to discuss the alternatives to mediation, negotiation in particular. *Id.* at 30. In the case of negotiation, power differentials are exacerbated. *Id.*

⁵³ Sander & Rozdeiczer, *supra* note 46, at 32. In addition to the obvious benefit that mediation is a powerful tool that can lead to the resolution of most disputes, if mediation doesn't lead to resolution, it can open the door to processes that lead to outcomes that are still beneficial to the parties, including post-mediation and out-of-court settlement. *Id.*

⁵⁴ *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 65–66 (rev. ed. 2005). Institutional mediation has been developing in the United States since the last century, and it first developed as a labor relations tool. Dorothy Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 39–40 (2002). After its introduction as a labor relations tool, mediation developed into a mechanism for social reform. *Id.* at 40.

mediator is to assist the parties in improving and moving in a positive direction the ways in which the parties interact with one another.⁵⁵ There are three generally accepted mediation models: evaluative, facilitative, and transformative.⁵⁶ The models can be distributed on a continuum of how actively the mediator is involved in the process, and a brief overview of each is helpful in putting this Note's ultimate advocacy for the transformative model into context.⁵⁷ Evaluative mediation features a very active mediator who will not only encourage settlement, but will at times propose a particular outcome for the dispute.⁵⁸ Farther along the continuum, facilitative mediators generally do not evaluate relative strengths of the case for the parties, but rather facilitate the conversation between the parties to move toward a resolution of the dispute.⁵⁹ Once a basic agreement is reached, a facilitative mediator will sometimes help the parties decide what particular provisions to provide in the final settlement.⁶⁰

⁵⁵ BUSH & FOLGER, *supra* note 54, at 66.

⁵⁶ LISA B. BINGHAM, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE* 13 (2003), http://businessofgovernment.org/pdfs/Bingham_Report.pdf (last visited Jan. 27, 2008).

⁵⁷ Della Noce, Bush, and Folger identify three possible theoretical mediation orientations: problem-solving, harmony, and transformative. Della Noce et al., *supra* note 54, at 47–48. The problem-solving model is identified as the pervasive orientation for mediators. *Id.* at 49. The problem-solving orientation is described as being "based on and reflect[ing] an individualist ideology, in which human beings are assumed to be autonomous, self-contained, atomistic individuals, each motivated by the pursuit of satisfaction of his or her own separate self-interests." *Id.* Problem-solving mediation "seldom go[es] by that precise name." *Id.* The problem-solving mediator's goal is to "generate an agreement that solves tangible problems on fair and realistic terms" with success being measured in terms of "issue identification, option creation, and effective persuasion to 'close the deal.'" *Id.* Focus within the problem-solving framework is "on mediator initiative and direction, because both are useful in generating settlement." *Id.* The evaluative and facilitative models, discussed *infra*, both fit nicely under the umbrella framework of the problem-solving orientation. As a result, the continuum from evaluative to transformative practice could alternatively be described as a continuum from the problem-solving to the transformative orientation. Della Noce et al., *supra* note 54, at 48–49.

⁵⁸ See BINGHAM, *supra* note 56, at 13.

⁵⁹ *Id.* The transformative mediator's goal is to foster a dynamic in which the disputants experience empowerment, thereby opening each of them to the opposing perspective. *Id.* at 26. This dynamic is facilitative of the experience of justice by the disputants—a critical experience for anyone facing the taking of private property by the government. See *id.*

⁶⁰ *Id.*

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

At the opposite end of the mediator involvement continuum from the evaluative model lies the transformative model. The goal of transformative mediation is not to settle, but rather "to foster opportunities for the disputants to experience empowerment and recognition."⁶¹ The guiding force behind the transformative model is the book *The Promise of Mediation* written by Robert Baruch Bush and Joseph Folger.⁶² In a foundational passage from the book, setting forth the core theory of the model, the authors write:

The mediation process contains within it a unique potential for transforming conflict interaction and, as a result, changing the mindset of people who are involved in the process. This transformative potential stems from mediation's capacity to generate two important dynamic effects: empowerment and recognition . . . [*E*]mpowerment means the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life's problems. *Recognition* means the evocation in individuals of acknowledgment, understanding, or empathy for the situation and the views of the other [emphasis in original].⁶³

This view of mediation as a transformative event is the guiding principle for all of the recommendations set forth in this Note. The potential of mediation to transform the negative interaction of conflict into something positive should be central in thinking about any mediation model proposed to deal with eminent domain disputes.⁶⁴

As a practical matter, the transformative model is the most organic of the three.⁶⁵ Transformative mediators do not impose a structure for the proceeding on the participants, but instead ask the participants how they might like to structure the meeting.⁶⁶ While the mediator strives to put the mediation participants in charge of the process, it is appropriate under the model for the mediator "to highlight moments in the discourse when one participant recognizes and acknowledges the perspective of the other."⁶⁷ A hallmark of a transformative session is the mediator's use of open-ended

⁶¹ *Id.*

⁶² BINGHAM, *supra* note 56, at 13. See also JOEL LEVINE, TRANSFORMATIVE TOOLS: A TOOL KIT FOR TRANSFORMATIVE MEDIATION, http://acrnnet.org/acrlibrary/more.php?id=33_0_1_0_M (last visited Jan. 27, 2008).

⁶³ BUSH & FOLGER, *supra* note 54, at 22.

⁶⁴ *Id.* at 56. For an in-depth rationale for adopting a particular theoretical framework, see Part III.B, *infra*.

⁶⁵ See BINGHAM, *supra* note 56, at 13, 15.

⁶⁶ *Id.* at 15.

⁶⁷ *Id.*

questions to help the parties become engaged with one another.⁶⁸ The transformative focus on empowering the parties and facilitating engagement is primed to address the needs of private property owners who are parties to eminent domain disputes.⁶⁹ Empowerment and engagement arguably contain the power to help property owners—so often members of neighborhoods lacking in political power⁷⁰—gain a voice in a dispute where they might otherwise have none and reconnect to the government entity involved in the dispute.⁷¹

B. *Why Embrace a Particular Theoretical Model?*

In response to queries about the relevance of advocating for the adoption of a particular mediation theory, the answer is simple: theory matters.⁷² In his discussion of a trend where mediation conference attendees ignore any

⁶⁸ LEVINE, *supra* note 62. Yes-or-no answers are anathema to good open-ended questions. *Id.* Transformative values dictate open-ended questions as a method of keeping the dialogue moving forward. *See id.*

⁶⁹ Not only is it possible to design a dispute resolution system that focuses on addressing justice needs of the disputants, it is desirable to do so. *See* BINGHAM, *supra* note 56, at 29. Furthermore, reduction of both perceived and actual structural bias within any such system is arguably needed to meet Due Process requirements. *Id.* "Structural bias is a phrase used to denote a rule system that operates to favor one party." *Id.* at 28.

⁷⁰ *See Kelo*, 125 S. Ct. at 2686–87 (Thomas, J., dissenting).

⁷¹ *See* BUSH & FOLGER, *supra* note 54, at 13 ("[T]he private, nonjudgmental character of mediation can provide disputants a nonthreatening opportunity to explain and humanize themselves to one another.").

⁷² Della Noce et al., *supra* note 54, at 40 ("The mediation field has been criticized by more than one scholar for its lack of an articulated theoretical framework—a coherent explanation of 'the when and why' of mediator intervention."); *see also* Della Noce, *supra* note 46, at 551–52 (discussing early critiques, before concentrated theoretical development began to occur, that the mediation process sacrificed important social values). More of a problem from a program design standpoint is the tendency of mediators to develop ad hoc theories when a formal theory is not adopted. *See* Della Noce et al., *supra* note 54, at 42. These "lay theories" incorporate the individual mediator's "vocabularies, frames of meaning, interpretive schemes and resources, and explanations for their social worlds and activities." *Id.* Without a unifying theoretical framework, there is evidence that mediators not only do not act with a common purpose, they will often resort to coercive measures to obtain party compliance in a mediation. *Id.* at 43. Furthermore, lay theorists have a problematic tendency to adopt theories from other sources, including negotiation theories. *Id.* at 44. Though these theories do cement the lay theorist to systems of thought, these "imported" theories were not developed for the facilitation of conflict resolution by third parties. *Id.* Without recognition of a mediation-specific, well-articulated theory, mediation practice is on unsure ground. *See id.* at 47.

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

particular theme that conference organizers might have decided upon, Professor Folger points to a human propensity to inadvertently ignore broad organizing principles—a behavior analogous to practitioners ignoring theory; implicit in his argument is that ignoring broad organizing principles leads to a substandard learning environment.⁷³ Strong theoretical underpinnings make for stronger mediation policy and practice.⁷⁴ Professor Della Noce notes a phenomenon in the early years of court-connected mediation programs: "[W]ithout a clearly stated [theoretical] explanation of . . . the mediation process, anchored in social values, the process was easily reduced to a set of decontextualized communication strategies and techniques."⁷⁵ Mediation's theoretical development has become a response to such decontextualization.⁷⁶ Embracing the development of underlying mediation theory will help lead both practitioners and systems designers to "pursue theoretical clarity through careful articulation of the fundamental social values that mediation uniquely advances" and to identify "value-based social goals" and relevant, goal-enhancing "policies and third-party practices."⁷⁷

Mediation policy and mediation theory go hand-in-hand.⁷⁸ Theory choice has implications for mediator certification, evaluation, client selection, ethical and confidentiality rules, and a number of other policy items.⁷⁹ Mediation policy does not occur in vacuum, but rather "every policy that defines or limits mediation in any way is built on a particular value-based vision of what mediation is and should be, and by its very existence reproduces that vision."⁸⁰ When particular social goals are being pursued, it is appropriate to explicitly endorse a particular mediation theory that supports those social goals and the policies that are necessary to achieve them.⁸¹

⁷³ See Joseph P. Folger, "Mediation Goes Mainstream"—*Taking the Conference Theme Challenge*, 3 PEPP. DISP. RESOL. L.J. 1, 2 (2002).

⁷⁴ See Della Noce, *supra* note 46, at 557–58.

⁷⁵ *Id.* at 554.

⁷⁶ See *id.*

⁷⁷ *Id.* at 555.

⁷⁸ See Della Noce et al., *supra* note 54, at 64 ("Every policy discussion should include a discussion of what 'mediation' is, what theories of practice inform the policy initiative, whether particular theories are being (or should be) privileged by the policy initiative, what assumptions underlie those theories, and how those assumptions will shape practice and wider social consequences.").

⁷⁹ *Id.* at 59.

⁸⁰ *Id.*

⁸¹ *Id.* at 63. Explicit, rather than implicit, endorsement of a mediation theory has significant policy implications:

C. *Why Embrace Transformative Theory in the Eminent Domain Context?*

While mediation is suitable for the resolution of many different kinds of disputes, much weight is given to mediating disputes where the ongoing relationship between the parties is important.⁸² The transformative model is presumably appropriate for any number of different kinds of disputes, but it is particularly suited to those where the ongoing relationship among all parties needs preserving.⁸³ Transformative mediation theory adopts as a foundation that "human beings are assumed to be fundamentally social—formed in and through their relations with other human beings, essentially connected to others, and motivated by a desire for both personal autonomy and constructive social interaction."⁸⁴ Eminent domain disputes cut to the very social fabric of our democracy⁸⁵ and as such are ripe for resolution through transformative methods.⁸⁶

To some extent in all of the mediation models, but most surely in transformative mediation, the mediator is focused on the parties' self-determination within the process.⁸⁷ This concentration on party self-determination is supported by the Uniform Mediation Act, which views self-determination as one of the foundations of fairness and party satisfaction in mediation proceedings.⁸⁸ Putting private landowners who are involved in eminent domain disputes in charge of crafting a resolution will arguably go a

The explicit endorsement provides important information about the desired policy goals to program users and administrators, the mediation community, and others who will be affected by or need to interpret the policy. It protects the integrity of evaluation research. It also clarifies who is and who is not intended to be affected by the policy.

Id. Absent the clear social goals that indicate an explicit adoption of a mediation theory, however, policy-makers would be well served to remain inclusive in their approach to mediation program design. *Id.*

⁸² Carl M. Moore, *Why Do We Mediate?*, in *NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES* 195, 202 (Joseph P. Folger & Tricia S. Jones eds., 1994).

⁸³ LEVINE, *supra* note 62.

⁸⁴ Della Noce et al., *supra* note 54, at 51.

⁸⁵ This is true so far as property rights are accepted as being a foundational component of the democracy in the United States. *See* Madison, *supra* note 6.

⁸⁶ *See* Della Noce et al., *supra* note 54, at 51.

⁸⁷ *See* BUSH & FOLGER, *supra* note 54, at 66.

⁸⁸ UNIFORM MEDIATION ACT, *supra* note 48.

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

long way toward repairing the singular loss of losing personal property in an eminent domain action.⁸⁹

The transformative mediation model is well suited to assist parties to eminent domain disputes in coming to a resolution.⁹⁰ The emotional and psychic distance between private property owners and the agents of the government involved in eminent domain actions is presumably great.⁹¹ Transformative mediation offers a forum where the parties are expected to work cooperatively in the face of conflict to arrive at some mutually acceptable resolution.⁹²

Within a transformative mediation session, private landowners will have a chance to gain a sense of empowerment while facing a governmental actor.⁹³ If the government's bargaining agent—and the principal represented by that agent—is also able to see process benefits as a result of the mediation, so much the better; but the potential for radical, empowering benefits accruing to the landowner alone are enough to warrant adoption of a transformative model in eminent domain mediations.⁹⁴ The important relationship that a transformative model would seek to protect in this context is the relationship of property owners to their government.⁹⁵ By taking active steps to protect this relationship, transformative mediation in eminent domain

⁸⁹ See *Horney*, 853 N.E.2d at ¶ 41 n.9 (discussing the "elusive, metaphysical value" of privately held real property).

⁹⁰ The transformative benefits of mediation transcend the personal:

[M]ediation is the *appropriate* means of dispute resolution because we are unhappy with our communities the way they are. We believe they can be better and would like for them to be better . . . [S]ome means of dispute resolution are more likely to enable community and others are more likely to jeopardize community.

Moore, *supra* note 82, at 195. This community-affirming value of the transformative model has powerful ramifications for the eminent domain arena where individuals who are rooted in a "primary community" are forced to interact with a "secondary community," represented by the government. See *id.* at 198.

⁹¹ See *id.*

⁹² See Della Noce et al., *supra* note 54, at 51. Transformative theory adopts a particular view of the cycle of human conflict, a cycle that has a predictable character. *Id.* at 50. This theory views conflict interactions as "mutually destructive, alienating, and dehumanizing." *Id.*

⁹³ BUSH & FOLGER, *supra* note 54, at 22.

⁹⁴ This benefit ought not be overlooked. The secondary community of the government requires healthy primary communities to give it meaning and structure. See Moore, *supra* note 82, at 198 n.4.

⁹⁵ *Id.* at 202 ("Mediation is one of the processes of interaction that has been invented to allow people to live together.").

disputes has the power to reinforce democratic values, which is arguably more fundamentally important than settling the disputes.⁹⁶

V. EXISTING IMPLEMENTATION FRAMEWORKS

Once a theoretical model for resolving eminent domain disputes has been decided upon, the next step is to consider implementation.⁹⁷ Because eminent domain disputes happen throughout the United States, in a variety of jurisdictions, there is room to implement any number of program models that embrace transformative mediation theory. However, there are two existing widespread mediation program models that can offer guidance to jurisdictions interested in adopting a transformative mediation approach to resolving eminent domain disputes, both of which employ rosters of mediators.⁹⁸ The United States Postal Service has famously implemented a transformative approach to mediating employment disputes.⁹⁹ Additionally, the Federal Mediation and Conciliation Service (FMCS)—while not expressly implementing any particular mediation model—has sixty years of experience providing and managing mediation programs for the labor sector.¹⁰⁰

⁹⁶ One of the assumptions of transformative theory—that, in part, humans are "motivated by a desire for both personal autonomy and constructive social interaction"—seems to directly channel democratic values. Della Noce et al., *supra* note 54, at 51. One example of this tension between autonomy and social interaction may be found in the Ohio Constitution. "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." OHIO CONST. art. 1, § 1 (as a social compact attempting to preserve individual rights, the document exhibits an essential democratic tension.).

⁹⁷ Whatever program is implemented, both the appearance and realization of fairness to the claimant is paramount. BINGHAM, *supra* note 56, at 28.

⁹⁸ Jurisdictions planning on developing a roster of mediators may be distinguished from those jurisdictions that choose to adopt programs using mediators on an ad hoc basis. Mediator rosters are in the ascendancy, but are not a new development in the field. Peter R. Maida, *Rosters and Mediator Quality: What Questions Should We Ask?*, DISP. RESOL. MAG., Fall 2001, at 17, 17. Rosters are helpful in providing mediators who have a particular expertise—which is of course relevant in the eminent domain context. *Id.* Rosters also provide a mechanism through which an agency or jurisdiction may exercise quality control over the mediators it uses. *Id.*

⁹⁹ BINGHAM, *supra* note 56, at 15.

¹⁰⁰ Federal Mediation & Conciliation Service, Who We Are, <http://www.fmcs.gov> (click on the "Who We Are" link, then follow the "Our History" link).

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

A. *United States Postal Service: REDRESS*

The Postal Service instituted its REDRESS employment mediation program in 1994.¹⁰¹ The REDRESS model of conflict resolution firmly embraces transformative mediation theory, with its focus on party control of the process and party empowerment.¹⁰² Managers of the REDRESS system see resolution as a by-product of the process; shifting the conversation between aggrieved parties from the destructive to the constructive is much of the real value of the mediation.¹⁰³

Between September 1998 and June 2000, eighty percent of the 17,645 disputes mediated by REDRESS mediators were resolved.¹⁰⁴ Furthermore, the Postal Service uses 3,000 mediators to implement the program.¹⁰⁵ The large scope and high percentage rate of successful resolutions make REDRESS an interesting model for any jurisdiction considering adopting a transformative mediation system for eminent domain disputes. Even more exciting for adopting jurisdictions is the high satisfaction rate with the process reported by both managers and employees who have participated.¹⁰⁶

The REDRESS model is particularly suited to serve as a model for the resolution of eminent domain disputes. Not only does it employ the transformative model, with all of its specific benefits discussed *supra*, but it also features mediation between parties in relationships with inherent power differentials.¹⁰⁷ The successes that REDRESS has achieved are presumably

¹⁰¹ United States Postal Service, REDRESS History, http://www.usps.com/redress/a_hist.htm. REDRESS emerged out of a class action lawsuit initiated in Florida. *Id.* The program was developed as a response to a claim within the lawsuit that the Equal Employment Opportunity complaint process was "too slow, remote, and ineffective in addressing workplace disputes." *Id.* REDRESS was the first mediation program to build upon an explicitly adopted theoretical framework. Della Noce et al., *supra* note 54, at 52. Incidentally, the acronym REDRESS stands for the rather unwieldy "Resolve Employment Disputes Reach Equitable Solutions Swiftly." United States Postal Services, REDRESS, <http://www.usps.com/redress>.

¹⁰² United States Postal Services, Transformative Mediation: Answers to Your Questions About Transformative Mediation, http://www.usps.com/redress/a_trans.htm.

¹⁰³ BINGHAM, *supra* note 56, at 15.

¹⁰⁴ *Id.* at 6.

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *Id.*

¹⁰⁷ The REDRESS program has a number of objective indicators of a fair dispute resolution process: mediation is voluntary, no party is bound to post-mediation action unless each party agrees to such action, no legal rights are compromised by participation

attributable, at least in part, to its proficiency at working within those power differentials.¹⁰⁸ Similar power differentials exist within the context of eminent domain disputes; the government plays the role of management, with the landowner in the part of the employee.¹⁰⁹ The REDRESS program's demonstrated ability¹¹⁰ to work within relationships containing these power differentials makes it most attractive as a model of dispute resolution for eminent domain disputes. Furthermore, REDRESS employs a roster of mediators which allows the program to exercise at least some control over the qualifications of its mediators.¹¹¹ Such a roster might be helpful for those jurisdictions seeking to establish a standing group of eminent domain mediators.¹¹²

B. Federal Mediation and Conciliation Service (FMCS)

Established in 1947 as an outgrowth of the Labor-Management Relations Act, the FMCS is charged with using mediation, conciliation, and voluntary arbitration services to reduce the impact of conflicts between labor and management.¹¹³ The FMCS provides another model of expertise in facilitating conflict resolution between parties with inherent power

in the process, and complainants may bring a third party to the mediation—as required by Equal Employment Opportunity Commission regulations. *Id.* at 29.

¹⁰⁸ Success has also come as a function of wise program design. Not only is REDRESS designed to promote actual fairness, it also fosters the perception of fairness. *See* BINGHAM, *supra* note 56, at 29. The program adopted as a marker of success the number of voluntary mediations accepted by complainants, as opposed to tracking settlement rates. *Id.* Program administrators were therefore incentivized to promote the program as "a fair, credible, and responsive process." *Id.* An additional reason for the program's success might very well be the required post-mediation evaluation of the mediator by the parties. Maida, *supra* note 98, at 19.

¹⁰⁹ Again, the distinction between "primary" and "secondary" communities is appropriate. Moore, *supra* note 82, at 198. Whether discussing employers and employees, or local government and citizens, viewing the groups as communities in conflict is helpful in appreciating the value of the transformative mediation model to solve these disputes. *Id.* at 195.

¹¹⁰ BINGHAM, *supra* note 56, at 29.

¹¹¹ *Id.* at 16.

¹¹² Maida, *supra* note 98, at 17.

¹¹³ Federal Mediation & Conciliation Service, *Who We Are*, *supra* note 100. At its creation, the FMCS was given federal independent agency status. *Id.* Depending on the service offered, the cost to the participants is at the most a small fee, and in many cases it is free of charge. Federal Mediation & Conciliation Service, *Who We Are*: FAQ, <http://www.fmcs.gov> (follow the "Who We Are" link, then follow the "FAQ" link).

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

differentials.¹¹⁴ While the mediation model employed by FMCS mediators is not necessarily transformative, the agency does have decades of experience managing a large pool of mediators to service a national labor market.¹¹⁵

The FMCS maintains both regional and field offices, offers mediation services to a wide-range of clients, both public and private,¹¹⁶ and employs over two hundred mediators for both domestic and international service.¹¹⁷ These mediators are on a roster, and domestically-domiciled prospective clients may contact mediators directly through the FMCS website.¹¹⁸

It is not being suggested that there should somehow be an effort to create a national bureau of mediators modeled on the FMCS to assist in eminent domain disputes. However, the FMCS does provide a model of an agency created to respond to a broad public service mandate.¹¹⁹ For larger

¹¹⁴ Much like the REDRESS mediators, FMCS mediators have expertise working with both union and non-union workplace disputes where the employer-employee relationship forms the backdrop of the dispute. Federal Mediation & Conciliation Service, What We Do: Dispute Resolution and Conflict Management, <http://www.fmcs.gov> (follow the "What We Do" link, then follow the "Dispute Resolution and Conflict Management" link).

¹¹⁵ See Federal Mediation & Conciliation Service, What We Do, <http://www.fmcs.gov> (follow "What We Do" link). While jurisdictions implementing eminent domain mediation programs most likely will not employ FMCS mediators, the agency does provide an interesting model as to how a government agency has been created and tasked with helping to resolve a particular class of disputes.

¹¹⁶ Federal Mediation & Conciliation Service, Who We Are, *supra* note 100. The FMCS breaks the country into two regions: the Eastern and the Western, with local field offices dispersed throughout the entire country. Federal Mediation & Conciliation Service, Who We Are: Regional Offices, <http://www.fmcs.gov> (follow the "Who We Are" link, then follow the "Agency Departments" link, then follow the "Regional Offices" link).

¹¹⁷ Federal Mediation & Conciliation Service, Who We Are: International and Dispute Resolution Services, <http://www.fmcs.gov> (follow the "Who We Are" link, then follow the "Agency Departments" link, then follow the "International/Dispute Resolution Services (ADR)" link).

¹¹⁸ See Federal Mediation & Conciliation Service, Contact Us, <http://www.fmcs.gov> (follow the "Make Contact" link, then follow the "Find a Mediator" link). The maintenance of a roster presumably allows the FMCS to provide mediators expert in the substantive areas where the agency is involved. Maida, *supra* note 98, at 17. While it remains to be seen whether maintenance of a roster has positive impacts on the quality of service mediators provide, rosters offer one potential mechanism for quality control. *Id.* at 18–19.

¹¹⁹ Federal Mediation & Conciliation Service, Who We Are: Our History, <http://www.fmcs.gov> (follow the "Who We Are" link, then follow the "Our History" link).

jurisdictions, it might very well be desirable to implement a network of mediators expert in eminent domain proceedings, and the FMCS offers a competent model for how that might be done.¹²⁰

VI. PROGRAM DESIGN RECOMMENDATIONS

The nature of eminent domain disputes as occurring between parties with vastly unequal bargaining power—private landowners and the government—combined with the highly personal and valued commodity of land,¹²¹ makes for a very specialized brand of dispute that tends to create instabilities in land markets.¹²² Mediation has been deemed appropriate for the resolution of these disputes by the several states that have expressly authorized it by statute.¹²³

It is beyond the scope of this Note to anticipate the particulars of program design that will be attractive to any jurisdictions adopting these recommendations. However, the following recommendations are applicable to any program that might be adopted on a jurisdiction-wide basis.

A. Adoption of Transformative Principles

Helping people live in communities is a key benefit of mediation, regardless of which style is being implemented: facilitative, evaluative, or transformative.¹²⁴ Mediation can bring a community-building ethos to the dispute resolution conversation that could be very effective at bridging the gap between landowner and government actor.¹²⁵ An exclusive focus on individual rights, found in litigation, can be community-limiting, while mediation has the power to build a dynamic that is community-expanding.¹²⁶

¹²⁰ Federal Mediation & Conciliation Service, *supra* note 115.

¹²¹ MELTZ, *supra* note 6, at 25–26.

¹²² See *Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting); see also *Norwood*, 853 N.E.2d at 1122 ("For the individual property owner, the appropriation is not simply the seizure of a house. It is the taking of a home—the place where ancestors toiled, where families were raised, where memories were made."); SIEGAN, *supra* note 48, at 229.

¹²³ See *supra* notes 37–42 and accompanying text.

¹²⁴ See Moore, *supra* note 82, at 201–02.

¹²⁵ See *id.*

¹²⁶ *Id.* ("Litigation, as a social form, is especially suited to an age that favors individualism, because it is an effective device for ascertaining the limits of individual rights."). Mediation has been described as a tool arising out of people's needs to find ways to live together. See *id.* at 202. Mediation as a process gives disputants a way to

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

Furthermore, transformative mediation in a court-connected setting—as it would be in any institutionalized eminent domain dispute resolution setting—has the potential to increase levels of party self-determination.¹²⁷ Transformative mediation expands party self-determination because the mediator does not lead the parties, but rather the parties' dispute resolution happens "as a result of *their* choices and *their* efforts" [emphasis in original].¹²⁸

When assessing the particular benefits of a transformative mediation model in the eminent domain context, it is illustrative to note that Professors Bush and Folger include a property dispute relating to a covenant found in a homeowner contract as a central example of transformative practice in their book.¹²⁹ While not exactly an eminent domain dispute, insofar as it implicates property rights and a power differential among the parties, the example may be analogized to the eminent domain context.¹³⁰ Among the interesting interactions brought out in the simulation is the drifting from the nominal subject of the mediation, the house, to an underlying structural conflict between the parties: perceptions and feelings of racism.¹³¹ The discussion of racism was a key component in the mediation, and leads Professors Bush and Folger to point out a premise of the transformative model: "People in conflict are seeking interactional transformation as much or more than reaching settlement of concrete issues."¹³²

It is clear that not all claimants in eminent domain proceedings will desire to seek out resolution of intangible issues; after all, what is at issue is the taking, or valuation after taking, of private property.¹³³ However,

struggle with one another through a dispute in a way that preserves relationships, and therefore preserves community. *Id.*

¹²⁷ BUSH & FOLGER, *supra* note 54, at 87–88. Some commentators fear that court-annexed mediation programs are diluting the self-determination benefits that mediation was once thought to bring. *Id.* Moving to a transformative model is arguably one way to reverse this trend. *Id.*

¹²⁸ *Id.* at 214.

¹²⁹ *Id.* at 133.

¹³⁰ The example is presented as a transcript of a model mediation done for research purposes with actors. *Id.* at 131–32. Presented in six segments, with discussion of the relevant issues as they arise, it forms a centerpiece of the book. BUSH & FOLGER, *supra* note 54, at 133–214.

¹³¹ *Id.* at 193. While in a traditional mediation model racism would most likely be avoided as a non-mediatable issue, in a transformative mediation the parties are allowed to explore the issues that have meaning for them. *See id.*

¹³² *Id.* at 214.

¹³³ MELTZ, *supra* note 6, at 3–4.

inasmuch as a transformative model has the power to put claimants in control of an eminent domain process that largely is intended to circumvent the individual in favor of society,¹³⁴ it has intrinsic value for those claimants. Transformative mediation's focus on recognition and empowerment,¹³⁵ taken in consideration with the high value that transformative theory places on party control and self-determination,¹³⁶ offers process benefits to individuals who are facing the infringement of individual property rights.¹³⁷

B. Development of a Cohort of Expert, Experienced Mediators

"Who will mediate?" is the driving inquiry for any proposed formalized mediation program such as the one being suggested here.¹³⁸ The answer to this inquiry has at least two variables: (1) the character of the cohort or roster of mediators; and (2) the selection of criteria with which to identify eligible mediators.

1. The Character of the Cohort or Roster

A number of threshold questions must be answered by any jurisdiction planning on adopting a standing mediation program.¹³⁹ How large will the cohort be?¹⁴⁰ How will individual mediators be assigned to individual cases?¹⁴¹ The Postal Service and the FMCS offer models of standing cohorts of mediators from which any jurisdiction contemplating adoption of an eminent domain mediation program may borrow.

¹³⁴ See *id.* at 4–5.

¹³⁵ BUSH & FOLGER, *supra* note 54, at 22.

¹³⁶ BINGHAM, *supra* note 56, at 15.

¹³⁷ See MELTZ, *supra* note 6, at 3–4. Of course, this Note does not address the possibility that litigation also provides process benefits to eminent domain disputants. Indeed, the literature is replete with examples of judicial intervention in eminent domain disputes. SIEGAN, *supra* note 48, at 75–158.

¹³⁸ See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, AND PRACTICE* § 6:10 (2d ed. 2006).

¹³⁹ *Id.* at § 6:1.

¹⁴⁰ See BINGHAM, *supra* note 56, at 16.

¹⁴¹ COLE ET AL., *supra* note 138, at § 6:10.

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

Additionally, standing mediation programs are becoming more popular throughout the nation in settings such as small claims courts,¹⁴² prosecutors' offices,¹⁴³ civil courts,¹⁴⁴ and state supreme courts.¹⁴⁵ The standing cohort of eminent domain disputes mediators does not need to be comprised of mediators working exclusively with an eminent domain caseload.¹⁴⁶ If a roster of mediators is not used, any existing mediation program presumably could be modified to include qualified eminent domain mediators.¹⁴⁷ Due to the relatively small number of eminent domain disputes,¹⁴⁸ states may also find it useful to centralize mediation efforts within existing programs in their supreme courts or administrative agencies.¹⁴⁹

¹⁴² The Massachusetts Court System: Small Claims Information, <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/smallclaims.html> (follow link "Is mediation available for small claims?"). This is but one example, selected randomly from an internet search.

¹⁴³ Columbus City Attorney's Office, Night Prosecutor Mediation Program, <http://www.columbuscityattorney.org/prosecution/mediation.aspx>. This is but one example, selected randomly from an internet search.

¹⁴⁴ Cook County Courts, Major Case Court-Annexed Civil Mediation, <http://www.cookcountycourt.org/divisions/index.html> (follow link "Law," then follow link "Major Case Court-Annexed Civil Mediation"). This is but one example, selected randomly from an internet search.

¹⁴⁵ Ohio Supreme Court, Court-Connected Mediation in Ohio, http://www.sconet.state.oh.us/dispute_resolution/resources/mediation.asp. This is but one example, selected randomly from an internet search.

¹⁴⁶ There is nothing to indicate that membership on a mediation roster should be exclusive, rather mediators might find it to be a wise business decision to be included on more than one roster. See Maida, *supra* note 98, at 17.

¹⁴⁷ The large-scale education and training effort conducted by REDRESS to gather a roster of 3,000 mediators is illustrative. BINGHAM, *supra* note 56, at 16. It is conceivable that a much smaller education effort could be employed to qualify eminent domain mediators in jurisdictions opting to initiate such a program.

¹⁴⁸ A terms and connectors search of the ALLCASES database on Westlaw, conducted on Mar. 14, 2007, for the calendar year 2006, resulted in a minimal number of reported cases. Fourteen cases were returned with the search term: "eminent domain" or condemn! or tak! /5 "real property" & "taking clause." One hundred and seventy-two cases were returned when the search was broadened by removing the word "real" from the search term. As a comparison, a search of the same database over the same time period for estate probate cases—the subject matter was chosen because it is a subset of all property cases, just like eminent domain cases—returned five hundred and seventy-five cases (search term: will or trust or devise /5 probate).

¹⁴⁹ Ohio Supreme Court, *supra* note 145.

2. Mediator Selection

Mediator selection for a given cohort also begs a set of critical questions, the answers to which will help in creating a solid eminent domain dispute resolution program. In what ways will new mediators be allowed into the cohort?¹⁵⁰ What are the processes by which existing mediators will be rotated out if proven to be ineffectual?¹⁵¹ What evaluation tools and techniques will be employed to guarantee quality services? What will be the indicia of success?¹⁵²

Eligibility standards for individual mediators will be dictated by whatever rules are in place within individual jurisdictions.¹⁵³ Many states have statutory requirements for the training of mediators, with other jurisdictions adding preliminary requirements such as education and expertise in the area of mediation.¹⁵⁴ Whatever jurisdiction-specific requirements are in place, mediators chosen to work with eminent domain disputes ought to be familiar with the transformative model and enough specifics of real estate and eminent domain disputes so as to be effective within the eminent domain arena.¹⁵⁵

The need for mediator certification is a subject of current debate in the professional literature,¹⁵⁶ but it remains an option for any jurisdiction planning on adopting the transformative model for eminent domain disputes,

¹⁵⁰ See BINGHAM, *supra* note 56, at 16.

¹⁵¹ COLE ET AL., *supra* note 138, at § 11:4 ("Those who see value in holding the mediator accountable for the fairness, quality, and effectiveness of the process have sometimes advocated a continuing oversight of mediators.").

¹⁵² See BINGHAM, *supra* note 56, at 16–17. As a general proposition, the transformative model does not count settlement rate as a valuable indicator of success. *Id.* at 13. Party self-control and self-determination—combined with the transforming effects of the process—are the primary benefits, rather than achieving settlement. *Id.*

¹⁵³ COLE ET AL., *supra* note 138, at § 11:2.

¹⁵⁴ *Id.* There has been a proliferation of statutes that address mediator quality, with over one hundred in existence. *Id.* The approaches to qualifying individuals to mediate vary, with little agreement among jurisdictions as to what criteria individuals must meet to become mediators. *Id.* Some states don't require any training, while others require up to sixty hours. *Id.* Some states require educational degrees, and others don't. *Id.* As one commentator has described the situation, "The common view seems to be only that *something* is required." COLE ET AL., *supra* note 138, at § 11:2 [emphasis added].

¹⁵⁵ Maida, *supra* note 98, at 18 (discussing consumers' expectations that members of mediator rosters are competent).

¹⁵⁶ COLE ET AL., *supra* note 138, at § 11:4. Certification is to be distinguished from licensing. *Id.* At this point, no state requires its mediators to be licensed. *Id.*

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

through a certification process administered by the Institute for the Study of Conflict Transformation (Institute).¹⁵⁷ Transformative certification is a two-part process: (1) a competency evaluation completed by an Institute assessor; and (2) an assessment of the mediator's understanding of transformative theory and how well it is applied.¹⁵⁸ Certification by the Institute results in basic eligibility to be included on any mediator rosters that the Institute might maintain.¹⁵⁹ Referring disputants to mediators listed on the rosters provided by the Institute is an option for any jurisdiction planning a mediation program based on transformative theory.

State certification of mediators is not widespread, though some states do require certification for some mediators.¹⁶⁰ In addition to state certification, various voluntary organizations offer certification¹⁶¹—the most relevant

¹⁵⁷ Institute for the Study of Conflict Transformation, Inc., <http://www.transformativemediation.org>. The Institute has its own certification process designed for individuals with "a commitment to the practice of transformative mediation." *Id.* Professors Bush and Folger, authors of *THE PROMISE OF MEDIATION*—the foundational text of transformative theory, discussed *supra* at note 54—are, among others, fellows of the Institute, which would seem to indicate that the Institute has credibility as a certifying organization. Institute for the Study of Conflict Transformation, Inc., Who's Who, <http://www.transformativemediation.org/who.htm>.

¹⁵⁸ INSTITUTE FOR THE STUDY OF CONFLICT TRANSFORMATION, MEDIATOR CERTIFICATION: DESCRIPTION OF APPLICATION PROCESS 1, *available at* <http://www.transformativemediation.org> (follow link "Click here for an Application and Description of the Certification Process") (last visited Mar. 14, 2007). The application for certification requires an interview—face-to-face or telephone—with an Institute assessor, a videotape of a live mediation, and evidence of both training and practice in the transformative model. *Id.* at 1–2. There is also an application fee of \$750. *Id.* at 1.

¹⁵⁹ *Id.* It is unclear from the Institute's website the number or nature of rosters that might be available, but the website does include a link where visitors can locate a certified mediator in a particular area, so presumably there is at least a basic roster of mediators who have become certified. *See supra* note 157 and accompanying text.

¹⁶⁰ COLE ET AL., *supra* note 138, at § 11:4 ("[S]everal states to certify mediators in some contexts."). New Hampshire, Florida, and North Carolina require certification for certain types of mediators. *Id.* The types of mediators requiring certification vary from state to state: marital mediators in New Hampshire, custody and visitation mediators in North Carolina, and mediators receiving court referrals in Florida. Utah also provides a certification program for all dispute resolution providers, but such certification is voluntary. *Id.*

¹⁶¹ *Id.* A joint study of the Association for Conflict Resolution and the Dispute Resolution Section of the American Bar Association conducted in 1995 reported mixed feelings about the prospect of a national mediator certification program. ASS'N FOR CONFLICT RESOL. & THE DISP. RESOL. SECTION OF THE AM. BAR ASS'N, ACR/ABA MEDIATOR CERTIFICATION FEASIBILITY STUDY 1–2 (2005), *available at* <http://www.acrnet.org/about/taskforces/certification.htm> (follow link "Download the

example being the transformative mediator certification offered by the Institute discussed *supra*.¹⁶² The benefit of certification is seen as increasing the chances that mediators will be trained and competent practitioners.¹⁶³

Planners of eminent domain mediation programs need to be aware of their state's certification requirements, as those requirements are a threshold to becoming a mediator in those states.¹⁶⁴ Regardless of state certification requirements, planners should also consider whether to require transformative certification for mediators working in eminent domain dispute resolution programs employing the transformative model, as this certification might be a mechanism for ensuring that quality service is provided by the mediators.¹⁶⁵

If certification is not required for employment by an eminent domain dispute resolution program, planners still need to decide what sorts of threshold qualifications will be appropriate for program mediators.¹⁶⁶ Mediator qualification statutes, rules, and regulations are widespread.¹⁶⁷ Education, skills, experience, and performance-based selection criteria are all routes to entry-level mediator qualification for various programs.¹⁶⁸ Some states vary the qualifications for mediators based on the subject matter that

Feasibility Study Survey Results") (last visited Mar. 14, 2007) [hereinafter FEASIBILITY STUDY]. The survey had respondents rate statements on a three-point scale: agree, disagree, and mixed feelings. *Id.* at 2–4. Of nearly 3100 hundred respondents to the statement, "A national certification program is needed for the mediator profession," 41% said they had mixed feelings, with 39% agreeing and 19% disagreeing. *Id.* at 2. Nearly half of the respondents felt that any national certification program developed should target entry-level mediators. *Id.* at 4. The transformative mediation certification offered by the Institute does not target entry-level mediation skills, but rather requires mastery of the transformative model. INSTITUTE FOR THE STUDY OF CONFLICT TRANSFORMATION, *supra* note 158, at 1.

¹⁶² *Id.*

¹⁶³ See COLE ET AL., *supra* note 138, at § 11:4. Attendant to state mediator certification is government regulation and the promulgation of ethical codes that apply to mediators. *Id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ *Id.* at § 11:2 ("Entry level qualifications for mediators represent the most common approach to regulating the quality of mediation and one means of promoting fairness within it.").

¹⁶⁷ *Id.*

¹⁶⁸ COLE ET AL., *supra* note 138, at § 11:4.

TRANSFORMATIVE EMINENT DOMAIN MEDIATION

forms the predicate dispute.¹⁶⁹ Eminent domain dispute program planners may choose to use mediator qualification standards found elsewhere in their jurisdiction or they may promulgate their own standards.¹⁷⁰

C. Maintenance of Program-Wide Autonomy to Avoid Perceived Conflicts of Interest

Due to the inherent involvement of the government in any eminent domain dispute,¹⁷¹ it will be critical to avoid the appearance of conflicts between a government mediator and the governmental entity or agent that is a party to the dispute: fairness is important.¹⁷² The Postal Service uses mediators that are outside of its direct employ,¹⁷³ and the FMCS is an independent agency.¹⁷⁴ Whether adopting jurisdictions create a separate agency, maintain a roster of mediators that work on a contract basis, or even incentivize the creation of community-based organizations that are officially separate from the government, steps will need to be taken to minimize, if not eliminate, perceived conflicts of interest.¹⁷⁵

Within the eminent domain context, serious thought should be given to making sure that eligible mediators are more than just qualified professional mediators. Because eminent domain proceedings necessarily involve a

¹⁶⁹ *Id.* ("[D]omestic relations mediators must have masters degrees in mental health in some jurisdictions, law degrees in other states, and no educational degrees in still others.").

¹⁷⁰ The Feasibility Study indicates that an overwhelming majority of respondents felt that certification should be granted based on prior mediation experience and prior training and knowledge that is related to mediation. FEASIBILITY STUDY, *supra* note 161, at 6. This suggests that there would be support within the at-large mediation community for linking eminent domain mediator qualification to skills and training that are relevant to mediation. Arguably, planners could extend such qualification requirements to include knowledge in matters relating to land use and property, which is analogous to states requiring a specific educational background to mediate disputes with a domestic relations predicate. COLE ET AL., *supra* note 138, at § 11:2.

¹⁷¹ MELTZ ET AL., *supra* note 6, at 3.

¹⁷² See COLE ET AL., *supra* note 138, at § 2:2.

¹⁷³ See BINGHAM, *supra* note 56, at 16.

¹⁷⁴ Federal Mediation & Conciliation Service, *supra* note 100.

¹⁷⁵ BINGHAM, *supra* note 56, at 28–29. For a mediation to be fair, it must involve party choice, and "outcome[s] [are] fair if freely chosen by the parties." COLE ET AL., *supra* note 138, at § 2:2. It follows logically that if claimants recognize bias in the mediation as a result of perceptions that the mediator has been co-opted by a government agency, then claimants might not feel free to reach a particular settlement.

conflict between private individuals and the state,¹⁷⁶ an additional hurdle that must be cleared is ensuring that the mediators both have the appearance and reality of neutrality—which could be compromised if the mediators are perceived by claimants as tools of the same government that is a party to the conflict.¹⁷⁷

VII. CONCLUSION

The current post-*Kelo* eminent domain landscape demands that efforts at mediating eminent domain disputes address the unique position of landowner-claimants. Adopting transformative mediation methods will allow disputants—and claimants in particular—to shape their own experience of resolving disputes that implicate the claimants' land. Because claimants primarily are disputing matters of land valuation, as opposed to the government's right to take the land, remedies will most likely be limited to compensation. For claimants, the process by which these valuations are done is of superior importance if the relationship between the claimant and the government is to be democratically reinforced. The democratic values of self-determination are available to a limited degree as part of the mediation process in general, but they are more available as a part of the transformative mediation model. The creation of a standing mediation program and a related mediation cohort will ensure stability, quality, and enhanced disputant experience throughout the eminent domain mediation process. Careful dispute program design is needed to ensure that perceived conflicts of interest are eliminated and that the resulting mediation process is indeed truly fair to all parties.

¹⁷⁶ *Kelo*, 125 S. Ct. at 2661.

¹⁷⁷ This is a critical point in dispute resolution system design where the fairness and justice needs of claimants can be effectively addressed through proper selection of the mediator cohort. See BINGHAM, *supra* note 56, at 29. In order for mediation to be a replacement for a judicial forum, fairness must be enforced. See COLE ET AL., *supra* note 138, at § 2:2.